TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~512.~~ 1611

JOHN J. MAHONY, APPELLANT, vs. THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FILED DECEMBER 14, 1868.

SUPREME COURT OF THE UNITED STATES.

No. 372.

JOHN J. MAHONY, APPELLANT, vs. THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

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1 [Copy.]

To the honorable the justices of the Court of Claims, now sitting at Washington, in the District of Columbia:

Respectfully represents your petitioner, John J. Mahony, of Boston, in the county of Suffolk and commonwealth of Massachusetts, that on the seventh day of March, in the year of our Lord eighteen hundred and fifty-four, he was duly appointed and commissioned by Franklin Pierce, then President of the United States of America, consul of said United States for the city of Algiers.

That he thereupon established his residence at said Algiers, and assumed and faithfully discharged the duties of said office until the twenty-fifth day of November, in the year of our Lord eighteen hundred and fifty-nine, when he resigned said office, and his resignation was duly accepted.

That he never has received any salary or compensation for his services in said office, although he believes and claims that he is entitled to have and receive from the said United States the salary of four thousand dollars per annum during the period he held said office, amounting to the sum of $18,866 00, by virtue of section 1, chapter 44, of the Acts of Congress, passed May 1st, 1810, entitled "An act fixing the compensation of public ministers and of consuls residing on the coast of Barbary, and for other purposes."

That he presented his said claim to the Treasury Department of said United States for allowance and payment, and the said Treasury Department thereafterwards referred the same to the State Department of said United States, and on the 22d day of July, A. D. 1865, the Honorable William H. Seward, Secretary of State, by his letter of that date, declared and informed your petitioner that his said claim could not be allowed, and payment thereof was refused.

And your petitioner declares that he is the sole owner of said claim, and that he has at all times borne true allegiance to the government of the United States, and has not in any way voluntarily aided, abetted or given encouragement to rebellion against the said government.

Wherefore your petitioner, feeling aggrieved by said disallowance and refusal, prays your honors to hear and determine his said claim, and if your petitioner is found to be entitled to payment of the same or any part thereof, that judgmeut may be rendered in his favor for the sum so found to be due to him.

JOHN J. MAHONY,
By his attorney, GEO. H. KINGSBURY.

2 I, Geo. H. Kingsbury, attorney for John J. Mahony, on oath declare that no assignment or transfer of said claim, or any part thereof, or any interest thereon, has been made; that I believe said claimant is justly entitled to the amount therein claimed from the United States, after allowing all just credits and offsets; and I believe the facts as stated in the foregoing petition are true.

GEO. H. KINGSBURY.

COMMONWEALTH OF MASSACHUSETTS,
City of Boston, County of Suffolk, ss:

Subscribed and sworn to by the said Geo. H. Kingsbury, this seventh day of October, A. D. 1865, before me.

[SEAL.] CALVIN P. HINDS,
Notary Public.

[Rev. stamp.]

Post office address of J. J. Mahony, claimant, 71 Broadway, New York. Post office address of Geo. H. Kingsbury, counsel, 46 Court st., Boston.

3 United States Court of Claims.

THE UNITED STATES
ats.
JOHN J. MAHONY.

And the said defendants by John J. Weed, their solicitor, come and make answer to the petition of the claimant on file herein, and not confessing the same or any part thereof, doth hereby most expressly deny each and every the allegations therein contained, and call for strict proof of the same.

And as to so much of said petition as sets forth and avers that the United States is indebted to said claimant in the sum of eighteen thousand eight hundred and sixty-six dollars, the defendants say that they are not indebted to said claimant in the said sum of money nor any part thereof.

JOHN J. WEED,
Assistant Solicitor for the United States.

4 In the Court of Claims.

JOHN J. MAHONY
vs.
THE UNITED STATES. } No. 2182.

And now to wit, March 23d, A. D. 1868, the court on due consideration of the premises, do find for the defendants, and do order, adjudge and decree, that the said claimant take nothing by his suit, and that his petition be dismissed.

By the court.

5 In the Court of Claims.

JNO. J. MAHONY
vs.
THE UNITED STATES. } No. 2182.

And now, on this 8th day of June, A. D. 1868, in open court, the claimant appeals from the final judgment of said court in the

above-entitled cause, and prays that his appeal may be allowed and duly certified to the Supreme Court of the United States, as the law and the rules of the court prescribe.

By his solicitor.

T. J. D. FULLER.

6 At a Court of Claims held at the Capitol, in the city of Washington, on Monday, June 15th, A. D. 1868.

JOHN J. MAHONY
vs.
THE UNITED STATES. } No. 2182.

Ordered that the petition for appeal, filed of this date, in this case, by the solicitor for the claimant, be, and is hereby, allowed.

By the court.

7 JOHN J. MAHONY
vs.
THE UNITED STATES. }

The court, on the pleadings and proofs herein, make and determine the following findings of facts:

1. On the 7th March, 1854, the claimant was duly appointed and commissioned as consul of the United States for the city of Algiers, which commission bore date the 7 March, 1854, and was duly signed by Franklin Pierce, President of the United States, and William L. Marcy, Secretary of State.

8 2. The claimant accepted the said office, and held the same till the 25th of November, 1859, when he resigned the same.

3. During the period the claimant so held office, he received no pay nor salary from the defendants, but he received from them certain necessary expenses of his office, to wit:

For removing archives of the consulate, repairs to the consulate, painting and gilding arms, postages, stationery, and laws of Algiers	$3749
For expenses of destitute American seamen	1194
For postages, stationery, freight, porterage, repairs to arms, removing archives	7231

9 He made no return of fees received by him as consul, if any, and he was allowed to transact business as a merchant by the Department of State, and did so transact business. He also made no claim for his salary as consul, while holding the office, nor when he resigned the same, nor at any time prior to July, 1865.

4. Prior to, and including, the year 1831, Congress appropriated $30,000 a year "for the expenses of intercourse with the Barbary powers," after the year 1831, $24,000 for intercourse with the Mediterranean powers. Algiers became a province of France, and was recognised as such about the year 1831. From the time Algiers be-

came such a province of France, the Department of State
10 treated the consulate as one without salary, and entitling the consul to transact business; and the immediate predecessor of the claimant held office upon these terms, and in this manner from the 1 January, 1838, to 31 March, 1851; and the facts that Algeria had ceased to be a mahomedan power, and had become a French province, and that the counsul at Algiers received only such fees as he might collect, and his necessary expenses, instead of the salary formerly allowed, were well known to the claimant, and were acceded to by him.

11 And upon the facts aforesaid, the court make and determine the following conclusions of law:

1. From and after the recognition of Algeria by the United States as a province of France, the powers and duties of the consulate at Algiers were regulated and defined by the treaties of the United States with France, and the consul became entitled to receive and hold his fees of office and to transact business, and was not entitled to receive the salary of $4,000 per annum authorized by the act of 1st May, 1810, fixing the compensation of consuls residing on the coast of Barbary.

2. The claimant, by accepting the office of consul at Algiers, with a knowledge of the facts that the defendants had uniformly
12 treated the office, for a great number of years, as one without salary, and that his immediate predecessor had held the office from 1838 till 1851, upon such terms; and by receiving and accepting the expenses of his said office, and by withholding the fees which he collected as consul. and by transacting private commercial business, and by uniformly treating the office as one without salary, and enjoying the profits and privileges of it as such, is concluded and estopped from recovering the salary sought to be recovered.

3. The facts being shown that a consul was marked on the
13 published official list of the Department of State as one allowed "to transact business," and that he made no claim for salary while holding the office, raise the presumption that he availed himself of that privilege, and constitute evidence to support such a finding of fact.

4. Upon the facts found the claimant in this case is not entitled to recover, and the petition should be dismissed.

14 In the Court of Claims.

JOHN J. MAHONY
vs.
THE UNITED STATES. } No. 2182.

I, John Randolph, ass't clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, and the final judgment of the court thereon; of the application of the solicitor for the claimant for the allowance of an appeal, and of the order of the court allowing the same; of the

special findings of fact by the court, and the conclusions of law on said facts on which the court finds its judgment.

In testimony whereof I have hereto set my hand and affixed the seal of said court, at Washington, this 12th day of November, A. D. 1868.

[SEAL.]

JOHN RANDOLPH,
Ass't Clerk Court of Claims.

REC. 372—2

Supreme Court of the United States.

MALONEY, Appellant,
vs.
UNITED STATES, Appellee,
} No. —.

APPELLANT'S BRIEF.

The material facts bearing upon the case, of which this court can take notice, are:

The appellant, in March, 1854, was appointed and commissioned consul of the United States at the port of Algiers, on the Mediterranean sea, and at once entered upon his duties, and continued in said office to September, 1859, when he tendered to the Department of State his resignation, which was accepted, and he was complimented officially for the satisfactory manner the duties of the office had been discharged. Claimant returned to the United States in 1865, and presented his claim to the Treasury for the salary prescribed for his office; it was referred to the Department of State, and payment declined, for the reasons given.

Immediately after such refusal, in November, 1865, he filed his petition in the Court of Claims, setting forth his commission, the letters of the Department of State accepting his resignation of the office in 1859, and the refusal to pay him his salary in 1865; deeming these documents, under the law, sufficient evidence to support his claim. The court dismissed his petition, for reasons set forth in 3 N. & H. Rep., p. 152.

Historically it appears (*see Conquest of Algiers, by Alfred*

Vetterment) that the blockade of the port of Algiers was commenced by the French forces the 15th of June, 1827, and continued until it was captured July 5, 1830, and on the 18th of July, the *Dey* formally renounced his authority, and embarked on board a French frigate for Naples, and on the succeeding day the French government announced in despatches that the port of Algiers was open for commerce with the commercial world. And Algiers from that time has been a dependency of France.

The act of Congress, (vol. 2, chap. 44, sec. 1, p. 608,) fixing the compensation of public ministers, *and of consuls residing on the coast of Barbary*, and for other purposes, enacts, among other things, "nor to any consul who shall be appointed to reside at Algiers a greater sum than at the rate of four thousand dollars per annum, as a compensation for all his personal services and expenses;" and by the 5th section of the same act it was further provided, "that no consul of the United States residing in the Barbary States shall own, in whole or in part, a vessel or be concerned in trade;" and by the 6th section of the same act, "consuls on the Barbary coast were to make annual reports to Congress of the disbursements and expenditures made on account of the United States."

The sum thus expended by appellant was $121 74. (See page 3 of record.) No part of it, however, being personal expenses, but all relating to Government property, excepting the small sum paid on account of destitute seamen.

That Congress, from 1810 to 1855, annually appropriated a sum, varying from $50,000 to $9,000 per annum, in a gross sum, in the several appropriation bills, under the uniform head of "*for expenses of intercourse with the Barbary Powers*," with the exception of the years 1832, 1833, and 1834, in which the word "*Mediterranean*" is substituted for the word "Barbary," but after that time the word Barbary is continued as before.

That Commodore David Porter appears to have been the last United States consul who was paid the salary of $4,000,

and he was paid that sum from May 26, 1830, to the 15th June, 1831, most a year after the surrender.

That from January, 1838, to March, 1851, Henry R. Stuckel was consul, and has only been paid his expenses, for *postage*, *flags*, and *seals*, &c.

By the terms of the treaty between the United States and the Dey and Regency of Algiers, vol. 8, p. 244, of the Stats., by the 2d article, all tribute was abolished; and by the 12th article commerce between the contracting parties was placed on a footing with the most favored nations; and by the 15th article consuls of the two countries were guarantied free travel and intercourse in their respective countries. And the further important provision was added that, if either party should thereafter make more favorable treaties with any other country, it should inure to the benefit of the other contracting party.

The treaty between the United States and France, of February, 1853, in relation to consular *affairs*, is not more liberal in its provisions than this treaty between the United States and Algiers.

Neither the consular treaty of February, 1853, with France or that with Algiers, contain one word in relation to the compensation to be paid by either Government to its own consuls, or the *way*, *manner*, or *amount of compensation* that shall be made them. That was left to each nation, to regulate at its own pleasure and in its own way.

No statute seems to have been enacted by Congress in relation to the compensation of foreign ministers or consuls, from the enactment of 1810 to the time of the enactment of the general consular law of 1855.

The act of 1855 has no general repealing clause, and *Algiers* is not embraced in the list of French ports, *foreign* or *domestic*, or in any of the French dependencies. The other Barbary Powers are specially provided for in this act, to wit: *Tunis*, *Tripoli*, and *Tangiers*. Algiers is not mentioned in the act.

Hence the consulate and port of Algiers remain unaffected by this act. But not so in the act of 1856, which went into operation January 1, 1857. (See vol. 11, p. 55.) Section 4 of this act has a clause not to be found in the act of 1855, which provides that all non-enumerated ports, and not embraced in the aforesaid schedules, shall be compensated by fees, &c., &c.

The uniform construction given to the words in the act of 1810, "*that not more than the sum mentioned shall be paid*," means that the sum named shall be paid, is supposed will not be controverted. For such is the uniform and uninterrupted construction given to it. (See Opinions of Attorneys General, vol. 4, pp. 295, 506.)

I.

The main question is, what effect does the conquest of Algiers, and its surrender to France on the 18th of July, 1830, have upon the statute of 1810? Does it repeal it, annul it, or impair it? Do the statute laws of the United States *rest* upon any such basis? Can they be repealed, or annulled, or impaired by the acts of any other power than the one which enacted them? I can readily perceive that a changed condition of the subject-matter to which the legislation has been applied may constitute very good reasons why the law-making power shall alter the law to suit the changed condition of the subject-matter; but, until it does so act, the law must necessarily continue to be the same.

The consular treaty of 1853, between the United States and France, does not in terms, or by the remotest implication even, repeal the act of 1810, or any of its provisions, touching compensation, for the reason, that it is silent upon the subject of compensation altogether.

It regulates the *duties* and *powers* of consuls, but that is a question quite distinct from the one of compensation.

Indeed, the court below conceded that the law of 1810,

fixing the compensation of the consul at Algiers, *was not repealed or abrogated by the act of conquest and surrender to France of Algiers.*

But it nevertheless held, that Algiers had ceased to exist, and that while the law had not been changed, the subject-matter of it had ceased to exist.

Now, how is this? Is it so?

As a physical fact, it cannot be pretended that the city of Algiers, with its one hundred and twenty thousand of inhabitants, had disappeared from the face of the earth; that its Mahometan religious faith had become changed; that its harbor had ceased, or its production of *wool* and *hides* and *fruits* had ceased, or that it was not frequented by our merchants and ships, for commerce and trade? All there is about it is, that it had ceased from being an independent Power, or nominally subject to Turkey, and had become a viceroyalty, or dependency of France.

Nor do the court attempt to call in question the propriety of the Executive of the United States conferring the appointment of a consul at that port, in 1854, upon an American citizen.

The case does not find that a single word ever passed between the appointing power and the appointee, about his compensation, or that any express agreement or contract was made on the subject of compensation.

The President or his Secretary of State could not repeal the law.

Neither would it be lawful for either of them to enter into a special contract with their appointee, that he should discharge the duties of an office, the compensation of which was established by law, for a less sum than the law allowed. That would be *immoral* and *degrading!* If the contract system is to prevail, a better and a fairer system would be to advertise to receive proposals, award the contract to the lowest bidder, on the best terms the duties of the office could be discharged, and where a fair competition would be invited! Neither is there anything unreasonable or unconscionable in the amount of the compensation claimed in this case, in the actual con-

dition of things. For, in the consular acts of 1855, $2,500 was allowed to the consuls of each of the ports of *Tangiers*, *Tripoli*, and *Tunis;* and in the act of 1856, the salaries of these consuls was increased to $3,000 per year; and under both acts the consuls were prohibited from trading on the Barbary coast. Circumstances and propriety conspire to show that the compensation of the consul at Algiers should not be below that of other inferior ports on the south shore of the Mediterranean. *If there could be no legal stipulation between the Government and the claimant, for the reasons named, much less will the law imply a contract.*

The court below inferred, and held, that there was an implied contract; that the claimant should take and hold this office, and receive fees for his compensation, in violation of law and the express prohibition of the statute.

One ground upon which this conclusion was reached was, that by the terms of the consular convention with France, of 1853, consuls of the United States residing in France might acquire property there, and should be protected in its enjoyment. Now, all there is on this subject is found in the 2d article of the treaty, and it is: "*If, however, said consuls are citizens of the country in which they reside, or become owners of property there, or engage in commerce, they shall be treated in the same manner as other citizens who are owners of property.*"

Whether consuls shall or shall not enter into trade in France, depends upon the laws and regulations of their own Government wholly, and not upon the terms of the treaty.

II.

The court below, in their finding of facts, in the third specification, say, "that the facts being shown that a consul was marked on the published official list of the Department of State as one allowed '*to transact business*,' and that he made no claim for salary while holding the office, raises the presumption that he availed himself of that privilege, and

constitutes sufficient evidence to support such a finding of fact."

Now, this inference was wholly unauthorized. The law would not permit any such inference to be drawn, and all the findings of fact by the court, that claimant did *trade*, or did receive and retain to his own use *fees*, is predicated on this inference, and not upon any other proof adduced in the case.

The claimant swears, in his petition, that he never did receive any salary or compensation whatever. He made no return of *fees*, because he, in fact, received none; nor was there a particle of evidence offered to show that he traded, or that he received and retained fees. The court erroneously assume the law to be, *he might do so;* and then, *secondly*, assume he did, *because* he might lawfully do so.

The court say, further, that he made no return of fees, *if he received any*. This does not mean that he did receive fees. The whole predicate of the court is based upon what, in their opinion, he might lawfully have done. The mere fact that this consulate was marked on the "Blue Book" as one paid by fees, did not make it so. How or in what manner the claimant's predecessor was paid, can have no effect upon the law of the case. It does not appear whether he was a citizen or alien; whether he resided at the port of Algiers, or elsewhere.

By the 5th section of act 1792, chapter 44, volume 1, page 256, consuls may be appointed to reside on the coast of Barbary, with a salary of $2,000 per year.

By the special act of July 6, 1797, volume 1, page 533, the President was authorized to appoint a consul at Algiers, with a salary of $4,000 per year. The act of 1810 repealed so much of said acts as fixed the compensation below $4,000.

THE CONSULAR OFFICE IS NOT A DIPLOMATIC ONE.

It is purely commercial in its character.

Judge Kent says, volume 1, page 40:

"*Consuls are commercial agents, appointed to reside in the sea-*

ports of foreign countries, with a commission to watch over the rights and privileges of the nation deputing them."

"*The utility of such a commercial officer has been perceived and felt by all trading nations, and the Mediterranean trade in particular* stands highly in need of such accredited agents."

Not by the act of February 28, 1803, as Judge Kent says, but it was by the 5th section of the act of 1810 that all consuls residing on the Barbary coast, whether at *Algiers*, *Tunis*, *Tripoli*, or *Tangiers*, were prohibited from owning vessels or being engaged in trade or merchandise, and this section was not repealed until the passage of the act of 1856.

The failure of Congress to make appropriations for the payment of the salary to a consul of Algiers after the year 1830 is denied. The appropriations, both before and after the conquest, being made in gross and not specific, no intention of Congress can be inferred on that subject.

See the annexed list of appropriations made by Congress on this subject:

Date of act fixing compensation May 1, 1810, (vol. 2, p. 608,) $4,000.

Appropriation Acts.

1810, vol. 2, p. 561, 26th Feb., 1810.—"*For expenses of intercourse with the Barbary Powers*, $50,000."

1810, vol. 2, p. 561, 26th Feb., 1810.—For *contingent* expenses with the Barbary Powers, $50,000.

1811, vol. 2, p. 647.—"For expenses of intercourse with the Barbary Powers, $50,000."

1812, vol. 2, p. 690.—For expenses of intercourse with the Barbary Powers, $50,000.

1813, vol. 2, p. 829.—For expenses of intercourse with the Barbary Powers, $50,000.

1814, vol. 3, p. 111.—For expenses of intercourse with the Barbary Powers, $10,000.

1815, vol. 3, p. 210.—For expenses of intercourse with the Barbary Powers, $10,000.

1816, vol. 3, p. 283.—For expenses of intercourse with the Barbary Powers, $47,000.

1817, vol. 3, p. 358.—For expenses of intercourse with the Barbary Powers, $47,000.

1818, vol. 3, p. 422.—For expenses of intercourse with the Barbary Powers, $42,000.

1819, vol. 3, p. 501.—For expenses of intercourse with the Barbary Powers, $42,000.

1820, vol. 3, p. 561.—For expenses of intercourse with the Barbary Powers, $42,000.
1821, vol. 3, p. 628.—For expenses of intercourse with the Barbary Powers, $42,000.
1822, vol. 3, p. 668.—None.
1823, vol. 3, p. 757.—None.
1824, vol. 4, p. 16.—For expenses of intercourse with the Barbary Powers, $30,000.
1825, vol. 4, p. 91.—For expenses of intercourse with the Barbary Powers, $30,000.
1826, vol. 4, p. 148.—For expenses of intercourse with the Barbary Powers, $30,000.
1827, vol. 4, p. 214.—For expenses of intercourse with the Barbary Powers, $20,000.
1828.—(No appropriation.)
1829, vol. 4, p. 344.—For expenses of intercourse with the Barbary Powers, $10,000.
1830, vol. 4, p. 382.—For expenses of intercourse with the Barbary Powers, $30,000.
1831, vol. 4, p. 459.—For expenses of intercourse with the Barbary Powers, $30,000.
1832, vol. 4, p. 513.—For expenses of intercourse with the Mediterranean Powers, $24,400.
1833, vol. 4, p. 624.—For expenses of intercourse with the Mediterranean Powers, $24,400.
1834, vol. 4, p. 699.—For expenses of intercourse with the Mediterranean Powers, $24,400.
1835, vol. 4, p. 769.—For expenses of intercourse with the Barbary Powers, $17,400.
1836, vol. 5, p. 24.—For expenses of intercourse with the Barbary Powers, $12,000.
1837, vol. 5, p. 170.—For expenses of intercourse with the Barbary Powers, $17,400.
1838, vol. 5, p. 222.—For expenses of intercourse with the Barbary Powers, $17,400.
1839, vol. 5, p. 345.—For expenses of intercourse with the Barbary Powers, $17,400.
1840.—None.
1841, vol. 5, p. 430.—For expenses of intercourse with the Barbary Powers, $17,400.
1842.—None.
1843, vol. 5, p. 643.—For expenses of intercourse with the Barbary Powers, $15,000.
1844, vol. 5, p. 692.—For expenses of intercourse with the Barbary Powers, $10,000.

1845.—None.
1846.—None.
1847, vol. 9, p. 166.—For expenses of intercourse with the Barbary Powers, $10,000.
1848, vol. 9, p. 299.—For expenses of intercourse with the Barbary Powers, $9,000.
1849, vol. 9, p. 369.—For expenses of intercourse with the Barbary Powers, $9,000.
1850, vol. 9, p. 535.—For expenses of intercourse with the Barbary Powers, $9,000.
1851, vol. 9, p. 506.—For expenses of intercourse with the Barbary Powers, $9,000.
1852, vol. 10, p. 88.—For expenses of intercourse with the Barbary Powers, $9,000.
1853, vol. 10, p. 203.—For expenses of intercourse with the Barbary Powers, $9,000.
1854, vol. 10, p. 564.—For expenses of intercourse with the Barbary Powers, $9,000.

The student of history, in searching out the question of the executive policy of the United States, will probably find, that at no period of its history was greater attention given to the extension of commercial intercourse with foreign Powers than from the years of 1853 to 1859, nor was it ever in a more prosperous condition.

Special attention was given to the appointment of consuls, as a means of extending our foreign commerce in those years. The acts of Congress as well as the acts of the Executive clearly evince this policy.

CONSULAR OFFICE.

The consular office, though commercial, and not diplomatic in its character, is a constitutional one.

The selection of the officer, and the *place* for the exercise of the duties of his office, is an executive, and not a legislative function.

The only limitation upon the Executive is, the office must be at a place foreign to the United States. The compensation to be fixed is purely and entirely a legislative function.

This power was exercised by the act of 1810, and the Ex-

ecutive could not change it, if he would, by express contract, and much less, will the law imply one.

The office being a commercial, and not a diplomatic one, it matters not whether Algiers became subject to the *sovereignty* of France, or remained subject to the *Ottoman Porte*, or any other European Power. If the island of *Cuba* should be ceded by Spain to any other European Power, *Havana* would nevertheless remain a commercial port, and the salary fixed by law to the American consul residing there would not be changed thereby.

That the question of compensation may be varied, after years of acquiescence in the erroneous holding of the departments, the case of the United States *vs.* McDonald, reported in — Wallace, p. —, is ample authority.

The court below erred, as a matter of law, in drawing inferences of fact, which the law would not authorize. They say, because the immediate predecessor of the claimant did not receive a salary, and because the office or consulate was marked or treated as one entitled to fees, and because claimant did not make claim to his salary while holding the office, he is estopped by these facts from claiming it now, whatever the law may be. The court gave to these facts, which may or may not exist, the effect of a technical release under seal.

Persons dealing with public agents are bound to know the law quite as well as the agent with whom the contract is made. It does not follow by any means, but the claimant well understood the law to be the same when he accepted the office as he now claims it to be. And no estoppel can be implied, any more than the contract can be.

The first palpable error of law, made by the court below, is, in their first finding, that the conquest of Algiers by France, and the recognition of it by the United States as a province or dependency of France, repealed the law of 1810,

deprived the claimant of the salary affixed by law to the office of consul, and authorized him to transact business, and to take fees, in lieu thereof.

The second proposition, distinct in its character, but which the court embraced in its first conclusion, that the *powers* and *duties* of the consul at Algiers were regulated by the existing treaties between the United States and France may be true and correct.

But that the existing treaty, or treaties, between the two countries, in any way *touch* or *regulate* the amount, *mode*, or manner of compensating consuls of the two countries, is denied.

The second error of law is, that the claimant is bound by the manner his predecessor was compensated, and that he thereby became obligated to receive his compensation in the same way.

The third error of law, is, the presumptions of fact, drawn, as a matter of legal inference, in the absence of any evidence to establish the fact, that the claimant did transact business, and did receive fees of office, which by law he could not do.

T. J. D. FULLER,
Attorney.

In the Supreme Court of the United States.

DECEMBER TERM, 1869.

JOHN J. MAHONEY
vs.
THE UNITED STATES. } No. 160.

Brief in defense.

This case comes here by appeal from the Court of Claims, whose judgment was in favor of the defendants.

The appellant was, on March 7, 1854, appointed consul of the United States for the city of Algiers, and held that office till November 25, 1859, when he resigned the same.

While holding this office he received no salary from the United States; nor did he make any claim for such salary during that period, or at any time till July, 1865.

The statute of May 1, 1810, (vol. II, p 608,) is the basis of this claim. No salary, however, under that statute has been paid by the United States to any consul at Algiers for any time later than June 15, 1831, which was soon after Algiers lost its former status as a city belonging to the Barbary Powers, and became a dependency of France.

An act of Congress of March 2, 1833, authorized a cer-

tain salary to be paid to a consular agent at Algiers; and the next statute touching this matter appears to be that of August 2, 1861, under the general provisions of which, at the discretion of the President, a consul at Algiers might be appointed "during the present insurrection," at a salary not exceeding fifteen hundred dollars.

The defense relies upon this point, namely:

The act of May 1, 1810, contemplated Algiers as a part of the Barbary Powers, and in fixing the salary for a consul at that city, became inoperative for want of a proper subject, by the transfer of that city to France.

The State Department has uniformly acted upon this construction in all consular appointments made since such transfer. All such appointments have been accepted and held upon the same construction for the same period.

The following statutes are cited as supporting this defense: July 6, 1797, vol. I, p. 533, chap. XII; May 1, 1810, vol. II, p. 608, sec. 1; March 2, 1833, vol. IV, p. 626; March 1, 1855, vol. X, p. 621, sec. 1; August 2, 1861, vol. XII, p. 285, also p. 336.

These statutes show a legislative sanction of the construction given to the act of May 1, 1810, by the State Department, namely, that it was, as to Algiers, repealed by the transfer of that city from a Mahometan power to the dominion of the Christian nation and old ally of the United States, the nation of France.

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